A **GINVERA MARKETING ENTERPRISE SDN BHD**

v.

TOHTONKU SDN BHD

B HIGH COURT MALAYA, KUALA LUMPUR
AZAHAR MOHAMED J
[SUIT NO: D-22(IP)-799-2002]
3 JUNE 2010

C ***TRADE MARKS:*** *Infringement of - Use of trademark 'Marvel Gel' - Likelihood of confusion - Whether defendant's trade mark could be distinguished from plaintiff's trademark*

TRADE MARKS: *Registered trademark - Expungement, application for*
D *- Certificate issued despite impending opposition proceedings - Whether certificate issued in violation of s. 28(1) Trade Marks Act 1976 and reg. 37 Trade Marks Regulations 1997 - Whether certificate rendered invalid*

TRADE MARKS: *Passing off - Misrepresentation - Whether defendant created false impression that its product was plaintiff's product - Plaintiff*
E *filed action before conducting market survey to establish likelihood of confusion - Whether plaintiff's action sustainable*

The plaintiff developed an exfoliating gel product and started selling it under the brand name "Marvel Gel". The defendant was
F a company and in business of manufacturing and selling various personal care products using the brand name "Follow Me". In 1999, the plaintiff applied to the Registrar of Trade Marks, Malaysia ('the registrar') to register the words "Marvel Gel" as a trademark. The trademark "Marvel Gel" was advertised in the
G Government Gazette on 20 December 2001. The defendant, pursuant to s. 28(1) of the Trade Marks Act 1976 ('the Act') and reg. 37 of the Trade Marks Regulations 1997 ('the regulations'), gave notice to the Registrar on 7 February 2002, opposing the plaintiff's application. The defendant contended that in 2001, it
H used the name "Marvel Gel" as part of the description for one of its skin products known as "Follow Me UV White Marvel Gel" until 2003 when it was changed to "Follow Me UV White Renewal Gel" up to the discontinuance of the product in March 2007. Despite the impending opposition proceedings by the
I defendant, the Registrar issued the Certificate of Registration for "Marvel Gel". However, a search conducted at the office of the Registrar showed the legal status of the plaintiff's application as 'pending (opposition)'.

On 24 May 2002, the plaintiff commenced the present suit against the defendant claiming that the defendant's use of "Marvel Gel", infringed its "Marvel Gel" trademark and/or act of passing off. The plaintiff later amended its statement of claim in May 2004 claiming that the defendant's subsequent use of "Renewal Gel" in December 2002 also amounted to passing off. The defendant on the other hand, claimed that the certificate issued by the Registrar should be set aside, as it was not issued pursuant to the provisions of the Act and the regulations. In determining the presence of infringement, the following issues were considered: (i) whether the defendant was liable for passing off by its use of the words "Marvel Gel"; (ii) whether members of the buying public would be able to distinguish the words "Follow Me Marvel Gel" from the plaintiff's "Ginvera Marvel Gel"; and, (iii) whether there was passing off by the use of the words "Renewal Gel".

Held (dismissing the plaintiff's claim with costs):

(1) The certificate was issued in violation of s. 28(1) of the Act and reg. 37 of the regulations which conferred the defendant a substantive right to be heard by way of the opposition procedure. Due to that, there was unmistakably a breach of the principles of natural justice. (para 12)

(2) The certificate in respect of the trademark "Marvel Gel" was invalid, as it was not issued in compliance with the provisions of the Act and regulations. On this ground alone, the plaintiff's "Marvel Gel" trademark should be expunged and removed from the register pursuant to s. 45(1)(a) of the Act as the entry was made without sufficient cause on the register. In reality, the mark "Marvel Gel" was an unregistered trademark and, thus, the plaintiff's action for trademark infringement failed as s. 82(1) of the Act provides that no person shall be entitled to initiate any action to prevent or to recover damages for infringement of an unregistered trademark. (para 14)

(3) There was no relief available for cases of infringement of unregistered trademark (s. 82(1) the Act). However, the right of action for passing off goods would not be deemed to be affected (s. 82(2) the Act). In passing off action, the misrepresentation by the defendant of its goods as that of the plaintiff was an essential element of the tort *(McCurry Restaurant (KL) Sdn Bhd v. McDonald's Corporation)*. (paras 15 & 16)

(4) The presentation of the defendant's "Follow Me Marvel Gel" was characteristically different from the plaintiff's product. The visual appearance of the defendant's packaging focused on the words "Follow Me" in a manner that customers' attention would immediately be drawn to the words "Follow Me". The use of the words "Marvel Gel" by the defendant on their product was unlikely to lead ordinary members of the buying public to believe that the defendant's product was the plaintiff's "Marvel Gel". The packaging of the defendant's product bore distinguishing words informing that the "Marvel Gel" was the defendant's product. When combined and viewed in its totality, there was no way that a reasonable person would take the defendant's product as the plaintiff's "Marvel Gel". Furthermore, the plaintiff failed to establish that customers had been confused by the defendant's use of "Marvel Gel" causing them to think that it originated from the plaintiff. (paras 20-21)

(5) The fact that the plaintiff commenced the suit against the defendant on 20 May 2002 but conducted the market survey from 25 May to 31 May 2002 and wrote the report in June 2002, showed that the plaintiff took the survey to ascertain whether there was confusion only after the commencement of the suit. Furthermore, there was merit in the defendant's submission that the questions asked by the plaintiff's interviewers were framed in such a way as to ensure a finding in favour of the plaintiff. The survey was all about the plaintiff's Marvel Gel and its identification with the product before the interviewee was shown with the plaintiff's product and, thus, the survey did not assist the plaintiff on the issue of misrepresentation by the defendant of its product as that of the plaintiff's. (para 23)

(6) The words "Marvel Gel" had dictionary meaning directly referring to the character and quality of the product. The plaintiff failed to establish that the words "Marvel Gel" have acquired their own independent secondary meaning given the highly descriptive nature of the words. The plaintiff had not established that the use of "Ginvera Marvel Gel" made "Marvel Gel" distinctive of the plaintiff such that the defendant's use of "Follow Me Marvel Gel" was deceptive and amounted to a misrepresentation. Having regard to the

aforesaid and the entire evidence, the plaintiff failed to prove a case of passing off by the defendant's use of the words "Marvel Gel". (paras 25, 27 & 28)

(7) It was established that the defendant used the name "Follow Me Marvel Gel" until August 2003 when it was changed to "Follow Me Renewal Gel". The plaintiff could not maintain its action against the defendant for the use of the words "Renewal Gel" on the product as the use of it was after the date the action was commenced *ie*, 24 May 2002. The amendment allowed by the court took effect at the date of the commencement of the action as if the amendment was made at the time the writ was issued. The plaintiff's cause of action could only be for matters occurred before the filing of the action *(Sio Koon Lin & Anor v. SB Mehra)*. (paras 31 & 32)

Case(s) referred to:

Chocosuisse Union Des Fabricants Suisses De Chocolat & Ors v. Maestro Swiss Chocolate Sdn Bhd & Ors [2010] 5 CLJ 794 HC ***(foll)***

Elba Group Sdn Bhd v. Pendaftar Cap Dagangan dan Paten, Malaysia & Anor [1998] 4 CLJ Supp 24 HC ***(foll)***

Eu Finance Bhd v. Lim Yoke Foo [1982] 1 LNS 21 FC ***(foll)***

Imperial v. Phillip Morris [1984] RPC 293 ***(refd)***

Malayan Banking Bhd v. PK Rajamani & Anor [2004] 3 CLJ 79 CA ***(foll)***

McCain International v. County Food Fair [1981] RPC 69

McCurry Restaurant (KL) Sdn Bhd v. McDonald's Corporation [2009] 3 CLJ 540 CA ***(foll)***

Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor [1996] 2 CLJ 586 FC ***(foll)***

Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners) [2000] 3 CLJ 16 CA ***(foll)***

Sio Koon Lin & Anor v. SB Mehra [1980] 1 LNS 135 FC ***(foll)***

Standard Chartered Bank Malaysia Berhad v. Mohd Nazro Zulkipeli [2009] 1 LNS 379 CA ***(foll)***

Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd [1992] 2 CLJ 1153; [1992] 1 CLJ (Rep) 344 SC

York Pacific Holdings Ltd v. U-Re Auto Sdn Bhd [1997] 1 LNS 118 HC ***(foll)***

Legislation referred to:

Trade Marks Act 1976, ss. 28(1), (4), 45(1)(a), 82(1), (2)

Trade Marks Regulations 1997, reg. 37

Other source(s) referred to:
Kerly's Law of Trademarks, 14th edn, p 608
Teo Bong Kwang, *Trade Marks and Service Marks Handbook,* MLJ Handbook Series 2003, Advisory Editor, pp. I-156, I-157, I-158, I-163

For the plaintiff - Kuek Pei Yee (Janice Sim with her); M/s Skrine
For the defendant - Gerald Samuel; M/s Ranjit Singh & Yeoh

Reported by Melanie Murthy

JUDGMENT

Azahar Mohamed J:

[1] The dispute in this action revolves around a skin care product called exfoliating and blackhead remover gel.

[2] Ginvera Marketing Enterprise Sdn Bhd (the plaintiff) developed an exfoliating gel product. The plaintiff then started selling it under the brand name Marvel Gel.

[3] In 1999, the plaintiff applied to the Registrar of Trade Marks, Malaysia (the registrar) to register the words Marvel Gel as a trade mark. The registrar on 4 March 2002 had issued the Certificate of Registration of Trade Mark No. 99/09638 in Class 3 (exh. P3). I will have a lot to say about this later on. Suffice for it now to say that it is the contention of the plaintiff that the said Certificate of Registration is *prima facie* evidence of the validity of the registration and therefore, the said Certificate is both valid and subsisting at all material times evidencing that the plaintiff is the registered proprietor of the Marvel Gel trade mark.

[4] Tohtonku Sdn Bhd (the defendant) is a company and is in the business of manufacturing and selling various personal care products such as toiletries, perfumery, shampoos and cosmetic products. The defendant uses the "Follow Me" brand for their products.

[5] In 2001, the defendant used the name Marvel Gel as part of the description of one of their skin products known as "Follow Me UV White Marvel Gel" until 2003 when they changed it to "Follow Me UV White Renewal Gel" until March 2007, when this product and the entire UV White range was discontinued by the defendant.

[6] The plaintiff's claim that the defendant's use of Marvel Gel infringes the said trademark and/or an act of passing off and that the defendant's use of Renewal Gel is also an act of trademark infringement and passing off.

[7] The defendant counterclaims that the Certificate of Registration of Trade Mark No. 99/09638 issued by the registrar should be set aside as it was not issued pursuant to the provisions of the Trade Marks Act 1976 (the Act) and the Trade Marks Regulations 1997 (the regulations).

[8] In view of the defendant's counterclaim, I will have to deal with and resolve the counterclaim in the first instance.

[9] It is not disputed that the plaintiff applied to register the MARVEL GEL trade mark on 29 September 1999. The registrar accepted the trade mark for registration and subsequently, caused it to be advertised in the Government Gazette on 20 December 2001. The purpose of advertisement is to allow interested parties, such as the defendant, to resist the application for registration. The defendant then pursuant to s. 28(1) of the Act and reg. 37 of the regulations gave notice to the registrar and the plaintiff of their intention to oppose the plaintiff's application. The defendant proceeded to file their written notice of opposition on 7 February 2002.

[10] After that, a very important and contentious event happened. It is a point to be emphasized here. It is this: on 4 March 2002, the registrar proceeded to issue the Certificate of Registration of Trade Mark No. 99/09638 even as opposition proceedings were still pending. As a matter of fact, a search conducted at the office of the registrar (see exh. D19) shows that the legal status of the plaintiff's application is declared as "Pending (opposition)".

[11] In this very context, I should state here that the provisions of the Act and the regulations lay down elaborate procedure for opposition by interested party. As far as it is relevant to the present case, the procedure is succinctly summarized in *Trade Marks and Service Marks Handbook*, MLJ Handbook Series 2003, Advisory Editor, Teo Bong Kwang as follows at pp. I-156, I-157 and I-158. The plaintiff has two months from date of receipt of the notice of opposition to send to the registrar and to the defendant a counter-statement of the grounds for application. If

the plaintiff submits a counter-statement, the defendant and the plaintiff must then within the prescribed time file evidence and exhibits in support of the opposition or the counter-statement. Failure to submit such evidence within the prescribed time may result in the opposition or the application being abandoned, as the case may be. If the plaintiff submits evidence and exhibits, the defendant may, within the prescribed time, send to the registrar and the plaintiff evidence in reply adduced in the prescribed manner. After considering the evidence and the exhibits and after giving both the plaintiff and then the defendant an opportunity to file written submissions, the registrar will decide either:

(i) To refuse registration of the mark;

(ii) To register the mark absolutely; or

(iii) To register the mark subject to such conditions, amendments, modifications, or limitations as the registrar sees fit.

Another very important point to take note is that the registrar's decision under s. 28(4) of the Act is subject to appeal to the High Court.

[12] Having regard to the factual matrix in the present case, evidently the Certificate of Registration of Trade Mark No. 99/09638 was issued in violation of the provisions of the Act and the regulations, which confer the defendant a substantive right to be heard by way of the opposition procedure as explained earlier. This being the case, there is unmistakably a breach of the principles of natural justice. What, then, is the effect?

[13] It has been held that an order of court obtained in breach of the principles of natural justice is a nullity as decided by our Federal Court in the case of *Muniandy Thamba Kaundan & Anor v. Development & Commercial Bank Berhad & Anor* [1996] 2 CLJ 586, where the failure of a charge to inform a chargor of an adjourned hearing rendered the order a nullity, (see also *Selvam Holdings (Malaysia) Sdn Bhd v. Grant Kenyon & Eckhardt Sdn Bhd; BSN Commercial Bank Malaysia Bhd & Ors (Interveners)* [2000] 3 CLJ 16, *Malayan Banking Bhd v. PK Rajamani & Anor* [2004] 3 CLJ 79. In *Eu Finance Bhd v. Lim Yoke Foo* [1982] 1 LNS 21 it was held that an order obtained in breach of rules of natural justice may be attacked in collateral proceedings *ex debitio justitae*.

The courts have also held that where there is non-compliance with the provisions of the statute the non-compliance would lead to the act as a result to be impugned (see: *Standard Chartered Bank Malaysia Berhad v. Mohd Nazro Zulkipeli* [2009] 1 LNS 379).

[14] It is with those principles in mind that in my judgment the Plaintiff's Certificate of Registration of Trade Mark No. 99/09638 in respect of the trademark MARVEL GEL is invalid, as it was not issued in compliance with the provisions of the Act and regulations. On this ground alone, this court order the expunction and removal of the plaintiff's Marvel Gel trademark from the register pursuant to s. 45(1)(a) of the said Act as the entry was made without sufficient cause on the register. Therefore, in reality, the mark Marvel Gel is an unregistered trade mark. Given this, the plaintiff's action for trademark infringement failed as s. 82(1) of the Act provides that no person shall be entitled to initiate any action to prevent or to recover damages for infringement of an unregistered trademark (see: *York Pacific Holdings Ltd v. U-Re Auto Sdn Bhd* [1997] 1 LNS 118).

[15] Now, in spite of all this, there is still one more issue, which remains to be answered, namely whether the defendant is liable for passing off by its use of the words Marvel Gel. In this regard, s. 82(2) of the Act is clear that even though the provisions of sub-section (1) as to the non-availability of any relief under the Act in cases of infringement of unregistered trademark, the right of action for passing off goods will not be deemed to be affected.

[16] In considering this matter, I have kept in the forefront of my mind that in passing off action, the misrepresentation by the defendant of their goods, as that of the plaintiff's is an essential element of the tort (see: *McCurry Restaurant (KL) Sdn Bhd v. McDonald's Corporation* [2009] 3 CLJ 540).

[17] This brings me to the next matter for consideration: whether the use of the words Follow Me UV White Marvel Gel by the defendant on their skin products, in the circumstances of the present case, has led or is likely to lead ordinary members of the skin products-buying public in Malaysia to believe that the product is the plaintiff's product namely, Ginvera Marvel Gel.

[18] Now, the ordinary members of the skin products buying public in Malaysia have to be taken as reasonable persons (see: *Chocosuisse Union Des Fabricants Suisses De Chocolat & Ors v. Maestro Swiss Chocolate Sdn Bhd & Ors* [2010] 5 CLJ 794).

[19] The principles of comparison, as can be seen from decided cases such as the Supreme Court in *Tohtonku Sdn Bhd v. Superace (M) Sdn Bhd* [1992] 2 CLJ 1153; [1992] 1 CLJ (Rep) 344, *Elba Group Sdn Bhd v. Pendaftar Cap Dagangan dan Paten Malaysia & Anor* [1998] 4 CLJ Supp 24, and *McCurry Restaurant (KL) Sdn Bhd v. McDonalds Corporation (supra)* dictate that marks must be compared in their entireties set against circumstances of each mark's respective uses in the course of trade before any determination of likelihood of confusion or deception may be arrived at. Consideration must therefore be given to the other words, marks and devices as a whole and not merely one element in it.

[20] Applying the foregoing principles to the present case, I have had the benefit of seeing and examining defendant's product. In my view, presentation of the defendant's product is characteristically different from that of the plaintiff's in that their skin product is known as Follow Me UV White Marvel Gel. The visual appearance of the defendant's packaging focus on the words Follow Me in a manner that customers' attention may immediately be drawn to the words Follow Me. It is relevant to bear in mind that the defendant uses the Follow Me brand for all their various personal care products. When looked in this way, in my view, the use of the words Marvel Gel by the defendant on their product, in the circumstances of the present case, is unlikely to lead ordinary members of the buying public to believe that the defendant's product is the plaintiff's Marvel Gel. The packaging of the defendant's product bears distinguishing words, which tells that the Marvel Gel is the product of defendant. In my view, when combined and viewed in their totality, there is no way the defendant's skin product can be taken by reasonable person as the plaintiff's Marvel Gel.

[21] Further, on this point, it has not been established by the plaintiff that customers have been confused by the defendant's use of Marvel Gel causing them to think it originates from the plaintiff. This brings me to the Management Report conducted by Consumer Probe (M) Sdn's survey evidence provided by the plaintiff in exh. P17. Ms Tan Hock Moey (PW6) gave evidence that prior to the commencement of this suit, Consumer Probe (M) Sdn Bhd was engaged to conduct the market survey. The witness said that the survey was conducted from 25 May to 31 May 2002 and the report was written in June 2002. The plaintiff

commenced this suit on 20 May 2002. It seems clear to me that the plaintiff never took any survey to ascertain whether there was confusion prior to the commencement of the suit.

[22] The principles regarding survey evidence is discussed in *Kerly's Law of Trademarks,* 14 edn at p. 608. It has been held that the basic rules of a survey in order to be probative were set out in *Imperial v. Phillip Morris* [1984] RPC 293 are:

(i) All surveys conducted, their methodology must be disclosed.

(ii) The totality of all answers must be disclosed.

(iii) The questions must not be leading.

(iv) The questions asked must not be lead the interviewees into a field of speculation upon which he would not have otherwise have embarked.

(v) The exact answers and not abbreviations must be provided.

(vi) Coding must be accurately carried out and coding methods disclosed.

(vii) The instructions given to interviewers must be disclosed.

[23] In the present case, the actual survey forms were never produced on the ground that the questionnaires were shredded. The respective persons who conducted the interviews also never gave evidence. Furthermore, there is merit in the submissions of learned counsel for the defendant that the questions that were asked by the interviewers are framed in such a way as to ensure a finding in favour of the plaintiff. It appears that the survey was structured to introduce the plaintiff's Marvel Gel to a respondent and then have him associate Marvel Gel with the plaintiff. In any event, the survey was all about the plaintiff's Marvel Gel, and about the identification of Marvel Gel with the plaintiff before the interviewee is shown the plaintiff's product. In my view, the survey does not assist the plaintiff on the issue of misrepresentation by the defendant of their product, as that of the plaintiff's.

[24] Therefore, having considered the totality of the testimonies of all the relevant witnesses and the exhibits tendered, I have come to the firm conclusion that reasonable members of the buying public will not be confused by the use of the words

A Marvel Gel into believing that the defendant's products were plaintiff's Marvel Gel. In my judgment, there had not been confusion between the defendant's product and plaintiff's product. For that reason, I find that the defendant had not passed off their products as plaintiff. In my judgment, the use of the words Marvel
B Gel did not constitute a representation that that product was plaintiff's Marvel Gel. The defendant did not create false impression that their product was plaintiff's Marvel Gel. The defendants did not misrepresent their goods as being in some way connected or associated with the plaintiff's. It follows that on this
C issue, the plaintiff failed.

[25] Moreover, the words in issue in this case are "Marvel Gel", which have a dictionary meaning. It is not an invented word. Longman Dictionary of Contemporary English carries the meaning
D of "Marvel" as "something that is extremely useful, miracle or wonder" and the meaning of "Gel" is defined as "a thick wet substance used in beauty or cleaning products". In this way, in my view, the words "Marvel Gel" is in fact descriptive of the product in question, namely a skin product called exfoliating and
E blackhead remover gel. What further supports this is the evidence of Dr Tor Lam Huat (PW1). In his evidence, PW1 said that he adopted the words from its dictionary meaning. Evidently, the plaintiff employed the words to describe their product as to show that the product is a wonderful or miraculous gel. It is important
F to bear in mind that the words Marvel Gel here are being used in relation to a facial cream or gel and so the words have a direct reference to the character and quality of the goods. In my view, in the case of a word, which has a direct reference to the character or quality of the goods or services, it may be very
G difficult to establish that the word has lost its primary signification and acquired a secondary meaning. Where the plaintiff's trade mark is descriptive of the plaintiff's goods, the plaintiff will not generally be able to show that the plaintiff's trade mark is distinctive of the plaintiff unless he can show that the secondary
H meaning has been acquired in law such that the public would associate the mark with the plaintiff and not with the description concerned (see: *Trade Marks and Service Marks Handbook (supra)* at 1-163).

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[26] In *McCain International v. County Food Fair* [1981] RPC 69, the plaintiff introduced a product and named them "McCain Oven Chips", and the defendant launched a similar product under the names "County Fair Oven Chips" and "Birds Eye Oven Chips". It was held by the English Court of Appeal that "Oven Chips" was descriptive of the product. As held by Lord Templeton that if the plaintiff takes the risk of choosing descriptive words they run the risk of the defendant cannot be prevented from using those same descriptive words so long as they make it clear that their brands of the product are not the same as the brand of the plaintiff.

[27] Having regard to the evidence, in my view, the plaintiff has failed to establish that the words Marvel Gel have acquired their own independent secondary meaning given the highly descriptive nature of the words. The plaintiff has not established that the use of Ginvera Marvel Gel has made Marvel Gel distinctive of the plaintiff such that the defendant's use of Follow Me UV White Marvel Gel is deceptive and amounts to a misrepresentation.

[28] Therefore looking at the entire evidence presented in this case, the plaintiff has not proven a case of passing off by the defendant's use of the words Marvel Gel.

[29] That leaves one matter outstanding: Is there passing off by the defendant by the use of the words Renewal Gel.

[30] The plaintiff filed this action on 24 May 2002. On 29 May 2004, the plaintiff amended their statement of claim and added paras. 20, 21, 22 and 29, which allege that the defendant had used the words Renewal Gel on their packaging and has associated Renewal Gel with Marvel Gel, and thereby the plaintiff claims that defendant's use of Renewal Gel amounts to passing off.

[31] However, during the trial it was established that the defendant used the name Follow Me UV White Marvel Gel until August 2003 until it was changed to Follow Me UV White Renewal Gel. In any event, the plaintiff's amended statement of claim alleges that the defendant started to use the name Renewal Gel in December 2002. PW2 confirmed that the defendant stopped using Marvel Gel and started using Renewal Gel after the action was filed.

[32] In my view, the plaintiff cannot maintain their claims against the defendant in the present action in respect of their use of the words Renewal Gel on the product as the use was after this action was commenced on 24 May 2002. An amendment that was allowed by the court took effect at the date of commencement of the action as if the amendment was made at the time the writ was issued. In the case of *Sio Koon Lin & Anor v. SB Mehra* [1980] 1 LNS 135; [1981] 1 MLJ 225, amendment was made to claim for an instalment that fell due after the writ was filed. Our Federal Court held that the plaintiff did not have any cause of action at the time of the filing of the suit in respect of the instalments not due then. The court held the plaintiff in that case should have commenced another action when the instalments fell due as the amendment does not introduce a new cause of action that did not exist at the date of the writ. Applying the said principle to the present case, in my view, the plaintiff's cause of action can only be for matters that occur before the filing of the action and since the defendant's use of Renewal Gel was after this action was filed, the plaintiff's claim regarding the defendant's use of Renewal Gel is not maintainable in this action.

[33] To sum it up, based on all the previously mentioned reasons, I allow the defendant's counterclaim. Consequently, I dismiss the whole of the plaintiff's claim with costs.